
COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2017-P-867

CAMBRIDGE STREET REALTY, LLC,
PLAINTIFF-APPELLEE,

v.

MELINDA STEWART,
DEFENDANT-APPELLANT.

On Appeal from the
Housing Court, Boston Division

**OPENING BRIEF OF DEFENDANT-APPELLANT
MELINDA STEWART**

August 23, 2017

Joshua J. Bone
BBO No. 687722
jbone@goodwinlaw.com
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
Telephone: (617) 570-1000
Facsimile: (617) 523-1231

TABLE OF CONTENTS

INTRODUCTION.....	6
STATEMENT OF ISSUES.....	7
STATEMENT OF THE CASE.....	8
STATEMENT OF THE FACTS.....	9
I. THE LEASE AGREEMENT.....	9
II. PROPOSED EVICTION AND HOUSING COURT PROCEEDINGS.....	11
SUMMARY OF ARGUMENT.....	14
ARGUMENT.....	16
I. STANDARD OF REVIEW.....	16
II. THE HOUSING COURT LACKED SUBJECT MATTER JURISDICTION OVER THIS SUMMARY PROCESS CASE.....	16
A. A Landlord Must Properly Terminate a Tenancy Prior to Filing a Summary Process Action.....	17
B. The Landlord Did Not Properly Terminate Ms. Stewart's Lease.....	19
C. Ms. Stewart Cannot Forfeit This Improper Termination Argument, Which Implicates Subject Matter Jurisdiction.....	23
III. AT THE LEAST, MS. STEWART SHOULD RECEIVE A NEW SUMMARY PROCESS TRIAL.....	27
CONCLUSION.....	33

TABLE OF AUTHORITIES

Cases	Page (s)
<u>Andover Hous. Auth. v. Shkolnik,</u> 443 Mass. 300 (2005)	16
<u>Archambault v. Walton,</u> 287 Mass. 216 (1934)	19
<u>Carter v. Lynn Hous. Auth.,</u> 450 Mass. 626 (2008)	29
<u>City Wide Assocs. v. Penfield,</u> 409 Mass. 140 (1991)	31
<u>CMJ Mgmt. Co. v. Wilkerson,</u> 91 Mass. App. Ct. 276 (2017)	29
<u>Commonwealth v. Nanny,</u> 462 Mass. 798 (2012)	20
<u>Corcoran Mgmt. Co., Inc. v. Withers,</u> 24 Mass. App. Ct. 736 (1987)	25
<u>Costa v. Fall River Hous. Auth.,</u> 71 Mass. App. Ct. 269 (2008)	9, 10, 29
<u>Dennis v. Dennis,</u> 337 Mass. 1 (1958)	24
<u>Harvard Real Estate-Allston, Inc. v. KMART Corp.,</u> 407 F. Supp. 2d 317 (D. Mass. 2005)	17
<u>Hashimi v. Kalil,</u> 388 Mass. 607 (1983)	20
<u>Hedco, Ltd. v. Blanchette,</u> 763 A.2d 639 (R.I. 2000)	25
<u>J.M. Realty Mgmt., Inc. v. Wallace,</u> No. 02-04767 (Bos. Hous. Ct. Nov. 14, 2002)	22, 25
<u>Kargman v. Dustin,</u> 5 Mass. App. Ct. 101 (1977)	28

<u>Lampasona v. Jacobs,</u> 553 A.2d 175 (Conn. 1989)	26
<u>Lowell Hous. Auth. v. Melendez,</u> 449 Mass. 34 (2007)	21
<u>Makrigiannis v. Nintendo of Am., Inc.,</u> 442 Mass. 675 (2004)	16
<u>Malloy v. Oviedo,</u> No. 95-04074 (Bos. Hous. Ct. Nov. 21, 1995)	25
<u>New Bedford Hous. Auth. v. Olan,</u> 435 Mass. 364 (2001)	28
<u>Peeples v. Avery,</u> No. 03-00773 (Bos. Hous. Ct. Mar. 20, 2003)	21
<u>Ramos v. Haymon,</u> No. 96-SP-04307 (Bos. Hous. Ct. Aug. 30, 1996)	19
<u>Ratner v. Hogan,</u> 251 Mass. 163 (1925)	18
<u>Realty Developing Co., Inc. v. Wakefield</u> <u>Ready-Mixed Concrete Co., Inc.,</u> 327 Mass. 535 (1951)	18
<u>Riverview Towers Assocs. v. Jones,</u> 817 A.2d 324 (N.J. Super. Ct. App. Div. 2003)	25
<u>Serna v. Gutierrez,</u> 297 P.3d 1238 (N.M. Ct. App. 2012)	21
<u>Shannon v. Jacobson,</u> 262 Mass. 463 (1928)	22, 23
<u>Spence v. Gormley,</u> 387 Mass. 258 (1982)	28, 29
<u>Tokar v. Goffigan,</u> No. 08H84SP00486 (Bos. Hous. Ct. Mar. 12, 2008)	25

Statutes

G.L. c. 186 § 11.....	19
G.L. c. 186, § 18.....	32
G.L. c. 239 § 1.....	17, 18

Regulations

24 C.F.R. § 982.555(e)(5).....	29
--------------------------------	----

Other Authorities

Boston Housing Authority, "Admissions and Continued Occupancy Policy," (Aug. 13, 2014)	9
Brian Ballou, "Families mourn 3 men killed in Roxbury shootings," <u>Boston Globe</u> (May 11, 2013)	11
14C Massachusetts Practice Series, Summary of Basic Law § 12.28 (4th ed.)	18
Thomas B. Merritt, <u>Termination of tenancy for nonpayment of rent</u> , 36A Massachusetts Practice Series, Consumer Law § 29:28 (3d ed.)	18

INTRODUCTION

Defendant-Appellant Melinda Stewart is the longtime resident of an apartment in Dorchester owned and managed by Plaintiff-Appellee Cambridge Street Realty LLC ("landlord"). Although Ms. Stewart had a positive relationship with her landlord for many years, recent events -- including the murder of Ms. Stewart's son, who had also been living in the dwelling -- caused her several times to end up a few dollars short on her monthly rent. Ms. Stewart ultimately paid her outstanding balance in full, but the landlord nonetheless initiated summary process eviction proceedings against her. The Boston Housing Court ultimately agreed that Ms. Stewart's late payment of a de minimis amount of rent provided a sufficient basis to evict her from her home.

This Court should reverse that decision, which was the product of two serious errors of law. First, the Housing Court ignored that the notice to terminate served on Ms. Stewart failed to comply with the requirements of the lease. Because Ms. Stewart therefore retains a legal right to occupy her dwelling, the Housing Court lacked subject matter

jurisdiction to order her eviction.

Second, the Housing Court violated Ms. Stewart's procedural rights by holding trial without warning on the same day it heard Ms. Stewart's motion to lift a default judgment. Although the court had provided Ms. Stewart and the landlord notice of the motion hearing, the court had provided no notice that it might proceed to trial immediately following that hearing. Ms. Stewart was therefore understandably unprepared to proceed, denying her a meaningful opportunity to present her defense to the eviction.

For these reasons, this Court should vacate the decision below and dismiss the case for lack of subject matter jurisdiction or, in the alternative, remand for a new trial.

STATEMENT OF ISSUES

1. Did the Housing Court have subject matter jurisdiction over this summary process action even though the notice terminating tenancy served on Ms. Stewart was legally insufficient?

2. Did the Housing Court violate Ms. Stewart's procedural rights by holding a summary process trial without prior notice?

STATEMENT OF THE CASE

On October 11, 2016, Ms. Stewart's landlord filed a summary process action against her in the Boston Division of the Housing Court. That court (Winik, J.) entered a default judgment in the landlord's favor on October 21, 2016. Upon Ms. Stewart's motion, the court removed the default judgment on November 10, 2016. Later that same day, the court tried the summary process action and, on November 15, 2016, entered judgment granting the landlord possession and, due to a scrivener's error, \$639.11 in costs and damages. Once that error was resolved, a corrected judgement was entered reducing costs and damages to \$234.51.

On November 23, 2016, Ms. Stewart filed a notice of appeal in this Court and moved to waive the appeal bond. On January 5, 2017, the housing court denied Ms. Stewart's motion and ordered her to post appeal bond in the amount of \$234.51 the very next day. A single justice of this court (Sullivan, J.) stayed the housing court's order and, on January 25, reduced the appeal bond to \$44, which Ms. Stewart posted. Following assembly of the record, this Court docketed

Ms. Stewart's appeal on June 30, 2017.

STATEMENT OF THE FACTS

I. THE LEASE AGREEMENT

Ms. Stewart is a beneficiary of the Section 8 Housing Choice Voucher Program of the United States Department of Housing and Urban Development and the Boston Housing Authority ("BHA"). To receive a Section 8 rental housing stipend, a tenant must qualify as low income.¹ In addition, the tenant must pass a background check, which includes an evaluation of criminal history, as well as interviews with current and former landlords and neighbors to identify past evictions, confirm the candidate's past prompt payment of rent, and evaluate the candidate's ability to maintain a clean and healthy home. Id. § 5.3.

An approved Section 8 tenant may "locate a suitable apartment in the private market and enter into a lease that is in accordance with the applicable housing authority guidelines." Costa v. Fall River Hous. Auth., 71 Mass. App. Ct. 269, 271 n.4 (2008) (citations and quotations omitted). If the applicable

¹ See Boston Housing Authority, "Admissions and Continued Occupancy Policy," § 5.1.4 (Aug. 13, 2014), <http://www.bostonhousing.org/en/Policies/Admissions-And-Continued-Occupancy-Policy-Ch-5-De.aspx>

housing authority -- here, the Boston Housing Authority -- "has approved the lease," the "family may then pay thirty percent of its adjusted monthly income to the owner of the unit in satisfaction of its rent obligation." Id. The remainder of the rent is paid by the housing authority. Id.

On July 30, 2010, Ms. Stewart entered into a Section 8 lease with the landlord to occupy 27 Julian Street, Suite #1 in Dorchester, Massachusetts. RA 60. The initial one-year term of the lease began to run on August 1, 2010. Id. Following this initial term, the lease became month-to-month until properly terminated by either party. Id. Particularly relevant here, clause 13(e) of the lease outlined certain requirements for proper termination:

NOTICE: To terminate this Lease, Owner shall give Tenant 14 days' notice in the case of nonpayment of rent and 30 days' notice in all other cases. The termination notice shall include the following language: "Your tenancy can be terminated only at the end of the initial Term or at the end of a Successive Term for other good cause, or during the Initial Term or Successive Term for serious or repeated violations of this Lease, violation of Federal, State or local law. The reason for termination of your lease is: _____"

RA 62. Per Section 8 rules, Ms. Stewart's rent was initially set at \$1,324 ("the contract rent"), \$1044 of which the BHA paid. RA 60. Ms. Stewart was to pay the remainder plus the costs of heat, hot water, and electricity. Id.

Beginning in August 2010, Ms. Stewart resided in the unit and split the rent and utility bills with her son, Mibsam Wiggins, until he was brutally murdered on May 3, 2013.² Since that time, Ms. Stewart has been responsible for shouldering the full financial obligation. That obligation increased in the summer of 2016, when the landlord requested and received from the BHA permission to increase Ms. Stewart's rent to \$1,500, with Ms. Stewart's share increasing to \$332 per month. RA 93, 94. Although, per Section 8 rules, Ms. Stewart had the option of challenging the rent increase, she instead accepted it and began paying the increased amount. RA 93.

II. PROPOSED EVICTION AND HOUSING COURT PROCEEDINGS

On August 31, 2016, the landlord, through its

² See Brian Ballou, "Families mourn 3 men killed in Roxbury shootings," Boston Globe (May 11, 2013), <https://www.bostonglobe.com/metro/2013/05/10/arrests-roxbury-double-homicide-relatives-and-friends-mourn-one-week-anniversary/grvvdzDmR9yUA7srrzcesJ/story.html>

attorney, served on Ms. Stewart a Notice Terminating Tenancy, which notified her to "QUIT and DELIVER UP" the unit by September 30, 2016. RA 9. The landlord offered as justification for termination that Ms. Stewart had "engag[ed] in and/or permitt[ed] serious repeated violations of the [Section 8] lease agreement." RA 10. Specifically, the landlord alleged that Ms. Stewart had repeatedly paid her rent late, and that she had improperly stored items in the building's common areas. Id. Notably, the Notice Terminating Tenancy did not contain the specific language required by clause 13(e).

On October 11, 2016, the landlord filed a summary process action to evict Ms. Stewart. Trial was initially scheduled nine days later, on October 20. Ms. Stewart was at the housing court that day, but due to confusion about when and where the trial would be held, she missed her case being called, and the judge entered a default judgment against her. RA 15. That same day, Ms. Stewart moved to remove the default judgment. RA 13. The court scheduled a hearing on her motion for November 10, 2016. RA 16.

Ms. Stewart arrived at the courthouse on the morning of November 10, 2016, expecting to litigate

the merits of her motion to remove the default judgment.³ She was therefore blindsided when the court, after granting her motion, proceeded to state that it would conduct a summary process trial that same day. RA 23-24. A volunteer attorney provided Ms. Stewart some assistance with settlement negotiations, but that attorney withdrew as soon as those negotiations fell through. RA 18, 19, 27-29

Indigent and without legal training, Ms. Stewart was left to litigate the case pro se against the landlord's hired counsel. Because Ms. Stewart lacked notice of the trial, she was plainly ill-prepared: she offered nothing into evidence besides her own testimony and failed to present a number of potentially meritorious legal arguments. The court frequently interrupted Ms. Stewart while she attempted in vain to divine the rules and conduct cross-examination for the first time. E.g., RA 38-40.

Unsurprisingly given that Ms. Stewart was denied a meaningful opportunity to present her defense, the

³ The landlord's counsel seemingly harbored similar expectations, as evidenced by the fact that he appeared in court that day without his client. Upon realizing the court planned to try the case, landlord's counsel told the court that his client "could be here in about twenty minutes." RA 23.

housing court entered judgment for the landlord, awarding possession of the unit and costs and damages. RA 97, 116. In its order supporting the judgment, the court found that even though "the outstanding rent balances due each month were not large" -- the arrears in September, October, and November 2016 totaled \$4 each month -- these balances nonetheless represented a "serious and repeated violation" of the lease. RA 95. And such a violation, the court continued, entitled the landlord to recover possession of the unit. Id. As for the landlord's allegation that Ms. Stewart improperly stored items in the common areas, the court found that the landlord had not "provided evidence sufficient to show that [Ms. Stewart] failed to remove her property from the common area promptly after she received notice from [the landlord]." Id. Thus, the eviction rested solely on the late payment of a small amount of rent.

SUMMARY OF ARGUMENT

The Housing Court's decision is the product of two significant errors of law.

First, the Housing Court lacked subject matter jurisdiction over this summary process action. See

infra at 16-27. The sole purpose of a summary process action is to evict a tenant with no lawful right to retain possession. Because a tenant has every right to retain possession until the tenancy is terminated, proper tenancy termination is a jurisdictional prerequisite to a summary process action.

Ms. Stewart's tenancy has never been properly terminated, so the Housing Court lacked subject matter jurisdiction over this case. Under Ms. Stewart's Section 8 lease, any termination notice must include specific language. But the notice Ms. Stewart received omitted that language, rendering the notice legally inoperative. Although Ms. Stewart failed to raise this argument before the housing court, litigants cannot waive or forfeit jurisdictional defects.

Second, Ms. Stewart's procedural rights were violated when the Boston Housing Court, without warning, held trial the same day it lifted the default judgment. See infra at 27-33. Given the total lack of notice, Ms. Stewart, a pro se litigant, was understandably unprepared to proceed to trial at that time: she introduced no evidence other than her own testimony and failed to present relevant, meritorious

arguments. Under these circumstances, Ms. Stewart was deprived of her right to present a meaningful defense.

For these reasons, this Court should vacate the decision below and dismiss this case for lack of subject matter jurisdiction. In the alternative, and at a minimum, this Court should vacate and remand for a new summary process trial.

ARGUMENT

I. STANDARD OF REVIEW

This court reviews a judge's factual findings following a bench trial for clear error, but reviews all conclusions of law de novo. Andover Hous. Auth. v. Shkolnik, 443 Mass. 300, 306 (2005); see also Makrigiannis v. Nintendo of Am., Inc., 442 Mass. 675, 677-78 (2004) ("[T]o ensure that the ultimate findings and conclusions are consistent with the law, we scrutinize without deference the legal standard which the judge applied to the facts." [citation omitted]).

II. THE HOUSING COURT LACKED SUBJECT MATTER JURISDICTION OVER THIS SUMMARY PROCESS CASE.

The Court should vacate the decision below and dismiss this case because the landlord failed to satisfy a prerequisite to summary process jurisdiction. The Housing Court may exercise

jurisdiction over a summary process action only after a tenancy has been properly terminated. But the termination notice served on Ms. Stewart omitted language required by her Section 8 lease, so Ms. Stewart's tenancy has never been properly terminated. Ms. Stewart therefore retains a right to occupy her home.

A. A Landlord Must Properly Terminate a Tenancy Prior to Filing a Summary Process Action.

Proper termination of a lease is a necessary prerequisite to a summary process action. "Summary process is a purely statutory procedure and can be maintained only in the instances specifically provided for in the statute." Harvard Real Estate-Allston, Inc. v. KMART Corp., 407 F. Supp. 2d 317, 319 (D. Mass. 2005), quoting Cummings v. Wajda, 325 Mass. 242, 243 (1950). Under the statute, a summary process action may be filed only "after the determination of a lease by its own limitation or by notice to quit or otherwise." G.L. c. 239 § 1.⁴ Thus, the Supreme

⁴ The relevant statutory provision, titled "Persons entitled to summary process," reads in full: "[I]f the lessee of land or tenements or a person holding under him holds possession without right after the determination of a lease by its own limitation or by notice to quit or otherwise . . . the person entitled

Judicial Court has recognized, "termination of the tenancy . . . is essential to the right to maintain an action of summary process[.]". Realty Developing Co., Inc. v. Wakefield Ready-Mixed Concrete Co., Inc., 327 Mass. 535, 537 (1951); see also Ratner v. Hogan, 251 Mass. 163, 165 (1925) ("To recover the possession of real estate under the provisions of G. L. c. 239, § 1, it is essential that . . . the tenancy previously subsisting should have been terminated.").⁵

This requirement is perfectly consistent with the purpose of the summary process procedure. As the Boston Housing Court has explained, "[t]he essence of a summary process claim is that a tenant is occupying the premises unlawfully and against the right of the

to the land or tenements may recover possession thereof under this chapter." G.L. c. 239 § 1.

⁵ Treatises confirm this understanding of the statutory requirement. See, e.g., 14C Massachusetts Practice Series, Summary of Basic Law § 12.28 (4th ed.) ("A prerequisite to the commencement of a summary process action to recover possession of rented premises is that the lessor or landlord has properly terminated the tenancy that existed."); Thomas B. Merritt, Termination of tenancy for nonpayment of rent, 36A Massachusetts Practice Series, Consumer Law § 29:28 (3d ed.) ("The first step the landlord must take [to terminate tenancy for nonpayment of rent] is to serve a 14-day 'notice to quit' on the tenant. . . . After the 14-day period has expired without the tenant having vacated, the landlord may then commence the summary process action in order to evict the tenant and recover any overdue rent." [emphasis added]).

landlord." Ramos v. Haymon, No. 96-SP-04307, at 2 (Bos. Hous. Ct. Aug. 30, 1996). Thus, the landlord has a right to seek eviction and possession through the courts. Until the tenancy is terminated, however, "the defendant continue[s] to have the legal right to occupy the premises under the terms of the lease," and the landlord has no right to seek eviction. Id.

B. The Landlord Did Not Properly Terminate Ms. Stewart's Lease.

Because Ms. Stewart's tenancy was not properly terminated, she retains a right to occupy her dwelling, and the landlord had no right to pursue this summary process action. Properly terminating a tenancy requires adhering not just to statutory baseline rules, see, e.g., G.L. c. 186 § 11, but also to all specific termination conditions laid out in the lease agreement, see, e.g., Archambault v. Walton, 287 Mass. 216, 218 (1934) (termination of tenancy invalid because notice of termination did not comply with lease requirements).

The notice of termination provided to Ms. Stewart did not comply with the requirements of the lease. As explained supra at 10, clause 13(e) of Ms. Stewart's Section 8 lease requires that

the termination notice shall
include the following language:
"Your tenancy can be terminated
only at the end of the Initial
Term or at the end of a Successive
Term for other good cause, or
during the Initial Term or
Successive Term for serious and
repeated violations of this Lease,
violation of Federal, State or
local law. The reason for
termination of your Lease
is: _____"

(emphasis added). The phrase "shall include the following language" unambiguously commands that the landlord include the specific words laid out in the lease -- not some paraphrase that might or might not sufficiently convey the same meaning. See Commonwealth v. Nanny, 462 Mass. 798, 802 (2012) (word "shall" is "clear and unambiguous" in creating a nondiscretionary command); Hashimi v. Kalil, 388 Mass. 607, 609 (1983) ("The word 'shall' is ordinarily interpreted as having a mandatory or imperative obligation."). But the notice provided to Ms. Stewart omitted this required language. RA 9-11.

This is no minor, excusable oversight. A landlord's obligations under a Section 8 lease serve to protect Section 8 housing voucher recipients, who "represent some of the most needy and vulnerable segments of our population, including low-income

families, children, the elderly, and the handicapped.”

Lowell Hous. Auth. v. Melendez, 449 Mass. 34, 40

(2007). It is plausible that Ms. Stewart’s Section 8 lease mandates inclusion of particular termination language because that language has been shown to best convey the rights Section 8 tenants retain in the event of termination.

Regardless of the purpose of the requirement, inclusion of particular termination language was part of the bargain the landlord accepted when it agreed to enter into this Section 8 lease. As the New Mexico appeals court recently observed, “the most vulnerable members of our community warrant protection from eviction by imposing a slightly higher standard on their landlords.” Serna v. Gutierrez, 297 P.3d 1238, 1245 (N.M. Ct. App. 2012); see also Peeples v. Avery, No. 03-00773, at 2 (Bos. Hous. Ct. Mar. 20, 2003) (“Based upon the lack of evidence as to compliance by the [landlord] with the termination requirements of the Section 8 Lease, the [landlord] has failed to prove his prima facie case for termination of the defendant’s lease.”). Permitting landlords to ignore their contractual obligations would water down that standard, undermining important protections for

Section 8 tenants.

The Boston Housing Court's opinion in J.M. Realty Mgmt., Inc. v. Wallace, No. 02-04767 (Bos. Hous. Ct. Nov. 14, 2002), is instructive. There, as here, the landlord sought to recover premises subsidized by the BHA's Section 8 program, but provided a notice to quit that failed to comply with the requirements of the Section 8 lease. Id. at 1. Because the notice to quit was therefore legally insufficient, the Court dismissed the summary process complaint. Id.

Even outside the Section 8 context, Massachusetts courts have recognized the importance of strict adherence to notice-of-termination requirements. For example, in Shannon v. Jacobson, 262 Mass. 463, 465, 467 (1928), a commercial landlord mailed a commercial tenant a notice stating that the landlord was terminating the tenancy because tenant had been declared bankrupt. But the lease required that the landlord make entry upon the leased premises to terminate the tenancy -- the lease did not permit termination by mail. Id. at 467. Although the tenant's bankruptcy justified terminating the lease, and although there was no dispute that the tenant had

actually received notice, the Supreme Judicial Court held that the notice "was not the means provided by the lease for bringing the tenancy to an end," so the landlord had "fail[ed] to show facts necessary to enable him to maintain the present [summary process] proceedings[.]" Id. If noncompliance with a lease's notice-of-termination provisions precludes a summary process action where the parties are sophisticated commercial entities, it surely precludes a summary process action in the Section 8 context, where the tenant is far less likely to understand and appreciate the imperfect notice that was provided.

Thus, the landlord has not properly terminated the lease, so Ms. Stewart retains a legal right to occupy her residence. Under these circumstances, the landlord may not "maintain the [summary process] proceedings" against Ms. Stewart, id., and the Housing Court erred by entering judgment in the landlord's favor.

C. Ms. Stewart Cannot Forfeit This Improper Termination Argument, Which Implicates Subject Matter Jurisdiction.

Although Ms. Stewart did not raise this issue at her summary process trial, she has not forfeited it. As an initial matter, Ms. Stewart did not receive

proper notice of the summary process trial, where she proceeded pro se. See supra at 12-13. She was therefore unable to prepare a proper defense. See infra at 27-33. Under these unique circumstances, the Court should forgive forfeiture.

In any event, improper lease termination deprives the Housing Court of subject matter jurisdiction over a summary process action, and parties cannot forfeit jurisdictional defects. Dennis v. Dennis, 337 Mass. 1, 4 (1958) (jurisdiction may be raised "at any stage of the proceedings"). As explained supra at 17-19, summary process actions are a creature of statute, and the statute conferring summary process jurisdiction on the housing courts demands as a prerequisite proper lease termination. Thus, the landlord has no right to pursue a summary process action -- and the Housing Court has no jurisdiction to grant relief in such an action -- unless the tenancy has been properly terminated.

Following this straightforward interpretation of the summary process statute, Massachusetts housing courts have routinely treated improper lease termination as a jurisdictional prerequisite for a summary process action. For example, the dismissal in

J.M. Realty Management., Inc., No. 02-04767, at 1, was "for lack of subject matter jurisdiction." See also, e.g., Tokar v. Goffigan, No. 08H84SP00486, at 1 (Bos. Hous. Ct. Mar. 12, 2008) (dismissing case for lack of subject matter jurisdiction where tenancy was reinstated after service of notice to quit but before landlord filed summary process action); Malloy v. Oviedo, No. 95-04074, at 4 (Bos. Hous. Ct. Nov. 21, 1995) ("Since the Notice to Quit dated May 22, 1995 did not properly terminate the defendants' tenancy, the plaintiff's summary process action must be dismissed . . . for lack of subject matter jurisdiction.").⁶

⁶ To be sure, no Massachusetts appellate court has ruled that improper tenancy termination implicates summary process jurisdiction rather than the merits. See Corcoran Mgmt. Co., Inc. v. Withers, 24 Mass. App. Ct. 736, 746 (1987) (declining to decide tenant's claim that court lacked subject matter jurisdiction where landlord failed to follow federal regulations governing tenancy termination). But appellate courts in other states have expressly recognized that housing courts lack subject matter jurisdiction over eviction proceedings where a tenancy has never been properly terminated. See, e.g., Riverview Towers Assocs. v. Jones, 817 A.2d 324, 327 (N.J. Super. Ct. App. Div. 2003) ("Based on the landlord's failure to comply with the HUD lease termination notice requirements, the trial court lacked jurisdiction to enter the judgments of possession."); Hedco, Ltd. v. Blanchette, 763 A.2d 639, 643 (R.I. 2000) ("Because service of a valid and proper notice to quit is a condition precedent to maintaining a trespass and ejectment action, plaintiff

This approach makes sense not just as a statutory matter, but also as a matter of public policy. Permitting housing courts to take jurisdiction over summary process eviction actions prior to lease termination would turn the summary process procedure on its head: rather than establish lawful possession, summary process proceedings might result in both the landlord and tenant having a valid claim of possession, the former pursuant to a summary process judgment and the latter pursuant to a still valid lease. These claims would be mutually exclusive, leaving possession indeterminable.

Moreover, particularly in the Section 8 context, unscrupulous landlords may be willing to cut procedural corners and seek possession without complying with lease termination terms. Treating proper lease termination as a jurisdictional prerequisite avoids these sorts of problems by inviting housing court judges to assess independently the sufficiency of termination regardless of whether

failed to properly invoke the jurisdiction of the court."); Lampasona v. Jacobs, 553 A.2d 175, 178 (Conn. 1989) ("As a condition precedent to a summary process action, proper notice to quit is a jurisdictional necessity.").

tenants raise the issue themselves, and by permitting tenants to raise the issue for the first time on appeal.

In sum, Ms. Stewart never received proper notice of lease termination, and therefore remains legally entitled to occupy her dwelling. As a result, the Boston Housing Court lacked jurisdiction to hear this summary process action. This Court should accordingly vacate the Housing Court's decision and dismiss this case for lack of subject matter jurisdiction.

III. AT THE LEAST, MS. STEWART SHOULD RECEIVE A NEW SUMMARY PROCESS TRIAL.

Even assuming the Housing Court had jurisdiction over this summary process case, this Court should vacate the Housing Court's decision and remand for a new trial. Because of the lack of advance notice of the trial date, Ms. Stewart was deprived of her right to a meaningful opportunity to present her defense. Had Ms. Stewart been given sufficient advance warning of the trial date, she could have presented additional relevant evidence bearing on the landlord's entitlement to the relief it sought.

Ms. Stewart has an unquestionable right to a pre-eviction hearing. "Massachusetts has long accorded

tenants both a constitutional and a statutory right to a jury trial in eviction cases." Kargman v. Dustin, 5 Mass. App. Ct. 101, 108 (1977); see also New Bedford Hous. Auth. v. Olan, 435 Mass. 364, 370 (2001) ("[T]he right to trial by jury in eviction cases has been preserved under art. 15" of the Massachusetts Constitution.). Although Ms. Stewart elected to proceed to a bench trial instead, she did not and could not waive her fundamental right to a fair hearing at which a neutral arbitrator would weigh her evidence and render a verdict. This right reflects the importance of the "controversy[,] . . . [which] "concerns property, and is a suit between two persons, a landlord and a tenant," who both claim lawful possession. Olan, 435 Mass. at 370 (quotation marks omitted). It also reflects the importance of the "tenant's interest in her public housing tenancy . . . to the tenant and her family, who may have nowhere else to turn." Spence v. Gormley, 387 Mass. 258, 274 (1982).

As the Supreme Judicial Court has recognized, this hearing right would mean nothing without more broadly guaranteeing tenants "fair procedures" prior

to eviction. Id.⁷ These procedures must be sufficient to provide "self-represented litigants," like Ms. Stewart, "the opportunity [in summary process bench trials] to meaningfully present their claims and defenses." CMJ Mgmt. Co. v. Wilkerson, 91 Mass. App. Ct. 276, 283 (2017) (quotation marks omitted; emphasis added). This means, at a minimum, that the summary process judge in a bench trial must offer a pro se litigant "a meaningful opportunity to present her case by guiding the proceedings in a neutral but engaged way." Id. (emphasis added); see also Carter v. Lynn Hous. Auth., 450 Mass. 626, 637 n.17 (2008) ("This court has recognized that self-represented litigants must be provided the opportunity to meaningfully present their cases." [quotation marks omitted; emphasis added]).

By providing no advance notice of the trial date, the Housing Court deprived Ms. Stewart of a meaningful opportunity to present her defense. As explained

⁷ Federal Section 8 regulations impose the same hearing requirement prior to lease termination. See 24 C.F.R. § 982.555(e)(5) (Section 8 participant must receive, *inter alia*, an "opportunity to present evidence, and to confront and cross-examine witnesses," prior to termination of the lease.); see also Costa, 71 Mass. App. Ct. at 280 (reciting this regulatory requirement).

supra at 12-13 & n.3, the summary process trial in this case was unexpectedly held on November 10, 2016, the same day the Housing Court lifted the default judgment against Ms. Stewart. When she arrived in Court that day, Mr. Stewart had no reason to believe she would have to argue anything more than her motion to lift the default judgment. See RA 16 (notice of motion hearing omitting any mention of potential trial date). As a result, Mr. Stewart offered no evidence other than her own testimony and failed to make arguments relevant to the summary process proceedings. Had Ms. Stewart been provided any notice of the possibility of trial on the same day as the motion hearing, she could have prepared her evidence and arguments in advance and arrived at court ready to present her defense.⁸

It makes no difference that Ms. Stewart had been prepared to go to trial on the original trial date of

⁸ To be clear, Ms. Stewart is not arguing that the court's decision to hold the summary process trial the same day it lifted the default judgment was necessarily improper. Ms. Stewart is arguing only that the court had an obligation to give her some advance warning that it might do so. For example, in the notice setting the motion hearing, RA 16, the court could have informed the parties to be prepared for potential trial that same day, in the event that the default judgment was lifted.

October 20, 2016. At that time, Ms. Stewart was mentally prepared to proceed with the case and had brought all relevant materials. By contrast, on November 10, Ms. Stewart saw no reason to bring relevant evidence with her to court - indeed, she did not even bring a copy of her lease. RA 29. And Ms. Stewart similarly saw no reason to bring any notes that might have helped her remember her arguments. Once the judge set the trial for the same day as the motion hearing, Ms. Stewart had no time to collect her materials and thoughts -- she simply had to proceed as best she could.

At a new trial, Ms. Stewart would come prepared with relevant arguments mitigating her responsibility for her late payment of a de minimis amount of rent. Specifically, and as explained in her attached declaration, these arguments would likely include: (1) that the landlord failed to provide Ms. Stewart with a reasonable accommodation for her disability, which prevented her from complying perfectly with the commands of her lease, see Addendum 2; see also City Wide Assocs. v. Penfield, 409 Mass. 140, 143 (1991) (landlord's failure to accept reasonable accommodation is affirmative defense in eviction action even where

tenant's violation of lease terms would normally support eviction); (2) that the landlord actually owes Ms. Stewart money rather than the other way around, see Addendum 2-3; and (3) that Ms. Stewart had reported numerous Housing Code violations to authorities, prompting the landlord to file this eviction action in retaliation, see id. at 3-4; see also G.L. c. 186, § 18 (permitting tenant to bring retaliation counterclaim where landlord commenced eviction proceedings because tenant reported Housing Code violations).⁹

In sum, the Housing Court violated Ms. Stewart's procedural rights by failing to provide any advance notice of the possibility of trial on November 10, 2016. Accordingly, this Court should, at minimum, vacate and remand for retrial so that Ms. Stewart may have a meaningful opportunity to present a defense before she is forcibly removed from her home.

⁹ Comments by Ms. Stewart's settlement counsel suggest that Ms. Stewart had intended to raise these arguments at the original trial. See RA 22-23 (stating before trial that Ms. Stewart had "meritorious defenses to the underlying action, including defenses of retaliation, discrimination, based on disability . . . the chronic late payment could be the result of disability").

CONCLUSION

For the foregoing reasons, Ms. Stewart respectfully requests that this Court vacate the Housing Court's decision and dismiss this summary process action for lack of subject matter jurisdiction. In the alternative, Ms. Stewart respectfully requests that this Court grant her a new summary process trial.

Dated: August 23, 2017

Respectfully submitted,

/s/ Joshua J. Bone

Joshua J. Bone, Esquire

BBO No. 687722

jbone@goodwinlaw.com

GOODWIN PROCTER LLP

100 Northern Avenue

Boston, MA 02210

Telephone: (617) 570-1000

Facsimile: (617) 523-1231

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, the undersigned counsel states that this brief complies with the rules of court that pertain to the filing of briefs, including but not limited to Mass. R. App. P. 16(b), 16(e), 16(f), 16(h), 18, and 20.

Dated: August 23, 2017

/s/ Joshua J. Bone
Joshua J. Bone

CERTIFICATE OF SERVICE

I, Joshua J. Bone, counsel for Melinda Stewart, hereby certify that I have served two copies of this Opening Brief and of the Record Appendix by causing them to be delivered by First Class Mail and email to counsel for Cambridge Street Reality, LLC, this 23rd day of August, 2017:

Ted Papadopoulos, Esquire
Ashton Law PC
28 Church St #10
Winchester, MA 01890.

/s/ Joshua J. Bone
Joshua J. Bone

ADDENDUM

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

CAMBRIDGE STREET REALTY,
LLC

Plaintiff-
Appellee,

v.

MELINDA STEWART,

Defendant-
Appellant.

No. 2017-P-867

DECLARATION OF MELINDA STEWART

I, Melinda Stewart, hereby declare as follows:

1. I am a resident of 27 Julian Street, Suite 1, Dorchester, MA 02125.

2. I submit this Declaration in support of my appeal of the Boston Housing Court's decision granting possession of my residence to Plaintiff-Appellee Cambridge Street Realty, LLC ("landlord") and awarding damages and costs against me.

3. I received no advance notice that the summary process trial might occur on November 11, 2016.

4. When I arrived at Court that day, I was prepared to argue my motion to lift the default

judgment. I was not prepared to present my defense at trial. I brought no evidence with me and had not thought through my arguments or cross-examination strategy.

5. Had I received notice that trial might occur on November 11, I could have introduced evidence and arguments relevant to my right to keep my home.

6. Specifically, I could have introduced evidence that the landlord failed to make reasonable accommodations for my disability. I suffer from diagnosed acute anxiety, which has worsened since the murder of my son. As a result of my disability, I receive federal Supplemental Security Income benefits. My anxiety often interferes with my ability to complete daily tasks, including timely payment of rent. My landlord is aware of my disability, but never made any attempt to accommodate it before filing this summary process action. I have documentation proving my disability that I could have brought to Court on November 11.

7. I also could have presented evidence that the landlord owes me a substantial sum of money due to its violations of the lease agreement, and that this amount is greater than my underpayment of rent. Under

the lease, I am not responsible for paying the costs of utilities in common areas. Nonetheless, I have reason to believe that I have been paying these expenses since I began residing in the dwelling. Specifically, my utility bills have always been unreasonably high, and the utility company has suggested that cross-metering may be a problem at my dwelling. I have supporting documentation in my possession -- including copies of my utility bills and notices from the utility company and housing inspectors -- and could have introduced this evidence had I known to bring it to court on November 11.

8. Finally, I could have presented evidence suggesting that this summary process action was initiated in retaliation for my decision to report certain Housing Code violations. Over the past several years, I have dealt with a number of significant problems with my apartment. For example, the mailboxes in the building were unsecured for 6 to 7 months. After the landlord did nothing about it, I contacted the Boston Housing Authority, which sent out an inspector. The inspector identified several Housing Code violations, including a possible illegal basement apartment. Later, another inspector visited

the building, determined that the landlord lacked a permit for the basement apartment, and issued a citation to that effect. I have reason to believe that my decision to contact the Housing Authority led to this summary process action. Among other things, I received an eviction notice and notice of a rent increase on the same day, suggesting that the landlord suddenly decided to target me. I have supporting documentation in my possession -- including Housing Authority violation notices -- and could have brought that documentation to Court on November 11.

9. This list is not meant to be exhaustive. I merely wish to convey the types of arguments and evidence I would have able to present had I been provided notice of the timing of trial.

10. This summary process eviction proceeding has caused me great stress and anxiety. I often feel so horrible that I am unable to do anything. Because of my uncertainty about whether I will be able to remain in my dwelling, I feel as if I have already lost my home. Indeed, I have begun throwing out my furniture. I have tried to find alternative housing, but have been unsuccessful. This appeal is my last hope.

Date: August 23, 2017

Signed under the penalties
of perjury,

/s/ Melinda Stewart

Melinda Stewart

27 Julian Street, Suite 1

Dorchester, MA 02125